Quality Mechanical Insulation, Inc. *and* International Association of Heat and Frost Insulators and Asbestos Workers, Local 73 of Arizona, AFL–CIO, CLC. Cases 28–CA–18031–1, 28–CA–18031–2, 28–CA–18031–3, 28–CA–18031–4, 28–CA–18161, 28–CA–18280, 28–CA–18281, and 28–CA–18286

September 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On July 7, 2003, Administrative Law Judge Gregory Z. Meyerson issued the attached decision. The Respondent filed exceptions, a supporting brief, and a request for oral argument.[1] The General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions as modified,[4] and to adopt the recommended Order as modified and set forth in full below.[5]

[1] The Respondent's request for oral argument is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] No exceptions were filed to the judge's dismissal of the complaint allegations that the Respondent violated Sec. 8(a)(3) and (1) of the Act by (1) terminating employee Miguel Aguilar on June 18, 2002; (2) terminating employees Jaime and Juan Carlos Haro on July 26, 2002; and (3) failing to hire or consider for hire various employee-applicants on various dates in June and July 2002.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[4] The judge found that Fred Morales' questioning of the Haro brothers on June 19, 2002, violated Sec. 8(a)(1) of the Act. While we agree with the judge that the conduct was coercive in nature, and constituted an unlawful interrogation, we find that the employees would not reasonably assume from the questioning that their union activities had been placed under surveillance. See *Fred'k Wallace & Son, Inc.*, 331 NLRB 914 (2000). Accordingly, we shall dismiss the complaint allegation that Morales' June 19 conduct created an impression among the Respondent's employees that their union activities were under surveillance.

[5] We shall modify the judge's conclusions of law, recommended Order, and notice to more closely conform to the facts of the case. We shall also modify the recommended Order in accordance with *Excel Container, Inc.*, 325 NLRB 17 (1997).

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judg-

AMENDED CONCLUSIONS OF LAW

1. Delete the judge's Conclusion of Law 3(b) and reletter the remaining paragraphs accordingly.

2. Substitute the following for the judge's Conclusion of Law 3(d).

"(d) Prohibiting its employees from speaking with, or taking papers from, a union organizer."

3. Substitute the following for the judge's Conclusion of Law 3(e).

"(e) Coercing or intimidating its employees by suggesting that bodily harm be done to an organizer of the Union in order to discourage its employees from engaging in union activities."

ORDER

The National Labor Relations Board orders that the Respondent, Quality Mechanical Insulation, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees regarding their union membership, activities, and sympathies.

(b) Threatening its employees with unspecified reprisals to discourage them from engaging in union and other concerted activities.

(c) Prohibiting its employees from speaking with, or taking papers from, organizers on behalf of the Union, or any other union.

(d) Coercing or intimidating its employees by suggesting that bodily harm be done to an organizer of the Union, or any other union, in order to discourage its employees from engaging in union activities.

(e) Threatening employee-applicants with trespassing and to summon the police, because of their union affiliation and other concerted activities.

(f) Engaging in surveillance of employee-applicants by photographing them, because of their union affiliation and other concerted activities.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days after service by the Region, post at its warehouse office in Phoenix, Arizona copies of the attached notice (in both English and Spanish), marked "Appendix."[6] Copies of the notice (in both English and

Spanish), on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice (in both English and Spanish) to all current employees and former employees employed by the Respondent at any time since June 19, 2002.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations not specifically found.

Dated, Washington, D.C. September 30, 2003

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Robert J. Battista, Chairman

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Wilma B. Liebman, Member

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Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT coercively question you about your support for, or activities on behalf of, International Association of Heat and Frost Insulators and Asbestos Workers, Local 73 of Arizona, AFL–CIO, CLC (the Union), or any other union.

WE WILL NOT threaten you with unspecified reprisals in order to discourage you from engaging in activities on behalf of the Union, or any other union.

WE WILL NOT prohibit you from speaking with, or taking papers from, organizers on behalf of the Union, or any other union.

WE WILL NOT coerce or intimidate you by suggesting that bodily harm be done to an organizer of the Union, or any other union, in order to discourage you from engaging in union activities.

WE WILL NOT threaten applicants for employment with trespassing and to summon the police, because of their affiliation with the Union, or any other union, or because they engage in group activities protected under the law.

WE WILL NOT engage in surveillance of applicants for employment by photographing them, because of their affiliation with the Union, or any other union, or because they engaged in group activities protected under the law.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the National Labor Relations Act.

QUALITY MECHANICAL INSULATION, INC.

William Mabry III, Esq., for the General Counsel.
Thomas M. Rogers, Esq., of Phoenix, Arizona, for the Respondent.

DECISION

STATEMENT OF THE CASE

GREGORY Z. MEYERSON, Administrative Law Judge. Pursuant to notice, I heard this case in Phoenix, Arizona, on 9 days between March 17 and 28, 2003. This case was tried following the issuance of a Third Consolidated Complaint and Notice of Hearing (the complaint), by the Regional Director for Region 28 of the National Labor Relations Board (the Board), on January 30, 2003. The complaint was based on a number of original and amended unfair labor practice charges, as captioned above, filed by International Association of Heat and Frost Insulators and Asbestos Workers, Local 73 of Arizona, AFL–CIO, CLC

ment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(the Union or Charging Party).[1] It alleges that Quality Mechanical Insulation, Inc. (the Employer or Respondent), violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying the commission of the alleged unfair labor practices.

All parties appeared at the hearing, and I provided them with the full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue orally and file briefs. Based on the record, my consideration of the briefs filed by counsel for the General Counsel and counsel for the Respondent, and my observation of the demeanor of the witnesses,[2] I now make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the answer admits, and I find that the Respondent is an Arizona corporation, with an office and warehouse in Phoenix, Arizona (the warehouse), and jobsites located throughout the State of Arizona, where it has been engaged in business as a mechanical insulator contractor. Further, I find that during the 12-month period ending June 26, 2002, the Respondent, in the course and conduct of its business operations, performed services valued in excess of $50,000 in states other than the State of Arizona.

Accordingly, I conclude that the Respondent is now, and at all times material has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that at all times material herein, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. The Dispute

The General Counsel alleges that on various dates in June and July 2002,[3] the Respondent failed and refused to either hire or to consider for hire a number of employee-applicants for employment because of their membership in, affiliation with, or activities on behalf of the Union. It is further alleged that the Respondent discharged employees Miguel Aguilar, Juan Carlos Haro, and Jaime Haro because of their support for the Union. Also, the complaint alleges that during the same time period, the Respondent threatened its employees with various adverse employment action including discharge and bodily harm, and did isolate employees, impose more onerous working conditions on an employee and increase his workload, all as a result of employees' union activities. Further, it is claimed that the Respondent interrogated its employees regarding their union affiliation, threatened employee-applicants with trespassing charges and to summon the police, and engaged in surveillance of them by, among other means, photographing their activities. At approximately the same period of time, the Respondent is alleged to have promulgated an overly broad rule prohibiting union activity at work, disparaged the Union, solicited its employees to do bodily harm to a union organizer, and expressed to its employees the futility of their union activities.

The Respondent denies the commission of any unfair labor practices. Specifically, it denies any effort to refuse to hire or consider for hire applicants for employment because of their union membership, affiliation, or activities. It is the Respondent's position that the alleged employee-applicants for employment named in the complaint attempted to apply for work at a time when the Respondent was not hiring, as evidenced by signs posted at its warehouse indicating, "Not Hiring" and "No Trepassing." Further, the Respondent contends that it has a long established priority procedure for the hiring of employees. Allegedly, its need for insulators[4] at a project is often sudden, and an attempt is usually made to satisfy the demand by a reassignment of existing employees. However, where this is not possible, the Respondent initially makes an effort to recall former employees who were previously laid off because of an economic reduction-in-force. If this does not satisfy its demand, the Respondent next makes an attempt to hire individuals who are referred by existing employees. Only after this effort fails would the Respondent consider hiring applicants "off the street," who simply apply for a job without a reference from an existing employee. According to the Respondent, this hiring procedure is intended to provide it with qualified, reliable employees, unrelated to whether an applicant is affiliated with a union or not.

Regarding the discharge of employees Miguel Aguilar, Juan Carlos Haro, and Jamie Haro, the Respondent contends that these were all for good cause, unrelated to any union activity or affiliation. Allegedly, Aguilar was fired for the use of an alias, and the two Haros, who are brothers, were fired because of low production and poor attitude. Further, the Respondent denies that any of its actions interfered with, restrained, or coerced employees in the exercise of their Section 7 rights. It is the Respondent's position that it has evidenced no animus toward the Union. According to the Respondent, it is allegedly the Union that has demonstrated hostility and a disregard for the rights of the Respondent, having interrupted its legitimate business operations through trespassing and other unlawful means.

[1] In its answer, the Respondent admits the various dates on which the enumerated original and amended charges were filed by the Union and served on the Respondent as alleged in the complaint.

[2] The credibility resolutions made in this decision are based on a review of the testimonial record and exhibits, with consideration given for reasonable probability and the demeanor of the witnesses. See *NLRB v. Walton Manufacturing Co.*, 369 U.S. 404, 408 (1962). Where witnesses have testified in contradiction to the findings herein, I have discredited their testimony, as either being in conflict with credited documentary or testimonial evidence, or because it was inherently incredible and unworthy of belief.

[3] All dates are in 2002 unless otherwise indicated.

[4] The term insulator is used interchangeably with the term installer.

B. Facts and Analysis

1. Background

The Respondent's principal office is located in Morristown, Arizona. However, the Respondent maintains another office at its warehouse in Phoenix, Arizona. It was at this warehouse location that most of the alleged unfair labor practices occurred. The owner of the Respondent is Mike Skaggs, whose father, Ray Skaggs, is the general manager. Reporting directly to Ray Skaggs (Skaggs) are two superintendents, brothers Albert and Fred Morales. The Morales brothers are located at the Respondent's office and warehouse in Phoenix, from which location Fred Morales supervises the Respondent's jobsites in the east part of the metropolitan area, while Albert Morales supervises the jobsites in the west part of the community. During June and July of 2002, the Respondent had approximately 40 field employees, including approximately 8 foremen. Most of the other approximately 32 field employees were installers. The Morales brothers supervise field personnel, are responsible for securing an adequate number of installers for each job, monitoring the progress of the work, and obtaining material for each jobsite. The field personnel report directly to the Morales brothers, who in turn report to Ray Skaggs. There is no dispute between the parties that the Morales brothers, and Ray and Mike Skaggs are all supervisors and agents of the Respondent, within the meaning of the Act.

However, the parties disagree as to the supervisory and agency status of the Respondent's foremen, specifically Antonio Galvan, who is alleged in the complaint as both a supervisor and an agent. It is the Respondent's position that it customarily refers to the men who are placed "in charge" of a particular jobsite as "leads" or "foremen." The two superintendents referred to these men as their "eyes and ears," regarding what was going on at the various jobsites. The Morales brothers typically each visit two to three jobsites per day and visit each site at least once a week. However, since they may have from 8 to 20 jobsites at any one time, they must rely on the foremen to report to them any problems on the sites. Normally, a foreman will call the office near the end of each workday and report to a superintendent on absences, production progress, and material needs. The foremen are given combined radios/cell phones for ease of communication with the office. It is important to note that these are very much "working" foremen, expected to install as much, or more, insulation as the other men on the crew. Additionally, they are expected to see that the job runs smoothly.

While on a jobsite, a foreman does have the authority to assign each member of the crew specific work duties, that being the area the employee is to insulate. Further, a foreman will reassign members of the crew to new insulation duties, as the need requires at the particular jobsite. Foremen do not have the authority to transfer employees from one jobsite to another. I do not believe that this "assignment" of work duties truly involves the exercise of independent judgment, as the crewmembers are all insulators and they would either begin work at one area or another. All the foreman is doing is providing some order and coordination to what would otherwise be a random selection. Also, while there was some testimony that "wrapping duct" is the least desirable type of insulation work, the vast majority of the testimony was that installers are expected to perform every type of insulation necessary on a particular job. Accordingly, I do not believe that assignment by foremen of duct wrap, or any other type of insulation, to crewmembers rises to the exercise of independent judgment, or is anything other than routine.

Foremen are expected to report problems on the jobsite to one of the Morales brothers. They are not authorized or expected to resolve problems in anything other than an informal way. If a foreman notices that a member of the crew is having a problem of some type, he would normally inquire as to the nature of the problem and whether there is some assistance he can render the employee. However, any significant problem with attendance, production, attitude or behavior must be referred by the foreman to a superintendent. This is done verbally, in the course of the daily communication between foreman and superintendent. The foremen normally do not prepare written reports concerning the performance of installers.

It is the General Counsel's burden to establish that Antonio Galvan is a supervisor within the meaning of the Act. The Board has long held that the burden of establishing that an individual is a statutory supervisor is to be borne by the party asserting such status. The Supreme Court approved the Board's evidentiary allocation in its paramount decision on the subject of supervisory status in *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 710–712 (2001). I am of the view that the General Counsel has failed to meet his burden.

Section 2(11) of the Act reads as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well established that the enumerated functions in Section 2(11) are to be read in the disjunctive, and the existence of any of them, regardless of the frequency of their performance is sufficient to confer supervisory status. *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980); *Queen Mary*, 317 NLRB 1303 (1995); and *Allen Services Co.*, 314 NLRB 1060 (1994). However, in my opinion, Antonio Galvan does not independently exercise any of the indicia of supervisory authority listed above. In reality, he is simply a working leadman or foreman who merely makes a routine assignment of work. His duties include routine direction and assistance in relation to other employees, which duties do not rise to the level of supervisory authority. See *Lampi LLC*, 322 NLRB 502 (1996); *Shen Lincoln-Mercury-Mitsubishi*, 321 NLRB 586, 594 (1996). While employees on a jobsite may come to Galvan with work-related questions, the record establishes that they are at liberty to by pass their foreman and go directly to the Morales brothers with their questions or concerns.

Also, while not dispositive, it is significant to note that foremen have the same benefits as other installers. Although most

of the foremen have more experience than the other installers and are paid more for that reason, they get no extra pay simply because they are "in charge" of a job. Foremen do not attend managerial meetings with the Skaggs and the Morales brothers. Further, the fact that a different foreman may have told an installer that he was the "boss," in no way supports an objective conclusion that foremen possess any of the indicia of supervisory authority.[5] It is not the individual's title or opinion of himself which determines whether he is a supervisor, but, rather, his job duties. *Winco Petroleum Co.*, 241 NLRB 1118, 1122 (1979), enfd. 668 F.2d 973 (8th Cir. 1982). Under the circumstances of this case, I conclude that Antonio Galvan is not a supervisor as defined in the Act.

Counsel for the General Counsel contends in his post-hearing brief that even if Antonio Galvan is determined not to be a supervisor, he is still an agent of the Respondent within the meaning of Section 2(13) of the Act. I disagree. As counsel notes, the Board applies common law principles of agency when examining whether an employee is an agent of his employer. Agency may be based on either actual or apparent authority to act for an employer. Apparent authority will results from a manifestation by the employer to a third party, such as an employee, which creates a reasonable basis for the employee to believe that the employer authorized the action of the alleged agent. The determination is whether under the circumstances, the employee would reasonably believe that the alleged agent was acting on behalf of management when he took the action in question. *Shen Lincoln-Mercury-Mitsubishi, Inc., supra* at 593; *Roskin Brothers, Inc.*, 274 NLRB 413, 421 (1985). Further, the Board has held that an employer may also be responsible for an alleged agent's action if that person is held out to employees as a "conduit" for the transmission of information from the employer to its employees. *Cooper Hand Tools*, 328 NLRB 145 (1999); *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426, 428 (1998).

However, under the facts of this case, I see no evidence that the Respondent was holding out its foremen, including Antonio Galvan, to the other employees as its agents. A reasonable employee should have perceived his foreman as another installer with the same or greater individual production responsibility as the other members of the crew. The reporting by the foremen of the status of the jobs to management did not constitute the transmission of information from the Respondent to its employees. While the foremen carried radio/cell phones for communication with the superintendents, these were for the most part intended for the reporting of job status information. The foremen would occasionally report employee problems to management over the radio/cell phones, however, there was significant testimony that employees were able to use the foremen's phones while on the job to communicate directly with the Morales brothers. Similarly, the superintendents could call on a foreman's phone, and then talk directly with any employee working on a crew. Also, an installer who needed to contact the jobsite was able to call the cell phone numbers for his foreman. These communications are unlike those where the Board concluded an employer was using the alleged agent as a "conduit" to directly transmit information from management to employees.

I do not believe that the Respondent placed its foremen in such a position that it would have been reasonable for the installers to conclude that the foremen were agents of the Respondent. From all the circumstances of this case, it appears that the installers viewed the foremen as simply other installers with the added responsibility of doing what they could to have the job run smoothly. I also see no evidence that Antonio Galvan held himself out as an agent of the Respondent, or as anything other than an experienced installer with certain job status reporting responsibilities. Accordingly, I conclude that Galvan is not an agent of the Respondent as defined in the Act.

According to the testimony of Fred Morales, the Respondent normally only knows a day or two in advance the number of insulators it will need on a particular new project. If it cannot staff the project by moving existing employees, the Respondent will initially attempt to "rehire" former employees who were previously released because of an economic reduction-in-force. Both the Morales brothers indicated that it is not difficult for them to contact former employees who were good workers and offer them an opportunity to return to the Employer. They do not keep any kind of formal list of names and telephone numbers, but, rather, just rely on personnel records and family contacts to get in touch with former workers. Both Morales brothers testified that it is normally not a problem to find former employees who are very anxious to return to work with the Respondent. However, on those occasions when former employees are not available, the Respondent relies on references from existing employees to hire "new" employees. According to Fred and Albert Morales, the rehire of former employees, and the hiring of new employees who are recommended by existing employees gives the Respondent a stable, dependable, productive work force.

Further, only rarely will the Respondent find it necessary to hire employees "off the street," meaning someone who came to the office to apply without having previously worked for the Respondent or having a reference from a current employee. According to the Morales brothers, the Respondent does not have a formal application process, and individuals seeking work are not permitted to fill out an application that is kept on file. Most of the time there is no work available, applicants are so informed, and told whether there may be something available in the future and, if so, to check back. Work for applicants "off the street" is available so seldom that the Respondent has a semipermanent sign on the gate in the chain link fence at its warehouse office location that states, "Not Hiring." (R. Exh. 6.) It is only during those rare, brief periods of time when the Respondent is actively seeking to hire an individual "off the street" that it covers the sign on its gate. It was the testimony of the Morales brothers that job openings only existed for very brief periods of time, and Fred Morales could not recall any installer who had actually been hired "off the street" during his 2 1/2 years as a superintendent.

It is appropriate to note at this point that in general, I found both Fred and Albert Morales to be highly credible witnesses. They each testified in a calm, deliberate fashion and without

[5] Forman Lazaro Campos testified that he had told installer Juan Carlos Haro that he was the "boss" on the job.

rancor, exaggeration, or embellishment. I was particularly impressed with their ability to recall events, and their testimony held up well under cross-examination. They impressed me as genuine and sincere young men. The testimony of both men was inherently consistent, and in both instances it had "the ring of authenticity."

Juan Carlos Haro and Jaime Haro were previous employees of the Respondent, having originally been recommended for employment by their father, who was at the time an employee of the Respondent. The Respondent originally employed them in approximately February and March of 2002, after which they were laid off. In June, the Haro brothers and Fred Morales had a number of telephone conversations about them returning to work for the Respondent. According to the testimony of Fred Morales, he knew approximately 1 week in advance, which was unusual, that a new project was to begin and, so, he contacted the Haros and asked them to come to the office on Friday, June 14, and talk about starting work. On that date both Haros appeared, accompanied by a third individual that Fred Morales did not know. This individual identified himself as Ricardo Lopez and the Haros indicated that he was their "friend." Lopez told Morales that he had experience as an installer and was looking for a job. Morales testified that he had a project starting the next day, which was larger than he had anticipated, and, so, he decided to rehire both Haros, who had been good workers, and to hire Lopez, who he felt the Haros had recommended by bringing him to the office and referring to him as their friend. All three men were hired and told to report to the DHL project the following day, Saturday.

The next day, Saturday, June 15, Fred Morales went to the jobsite to check on the progress of the three men. Morales testified that their "production was great," and that he was "shocked" and "impressed" with the excellent job Ricardo Lopez was doing. So impressed that Morales decided to give Lopez a one-dollar an hour raise. Fred Morales candidly testified that thereafter, on Monday, June 17, he received a call from Antonio Galvan, who at the time was a former installer who had been laid off.[6] Galvan informed Morales that the three men he had recently hired were affiliated with the Union. Morales understood that Galvan was referring to the Haros and Lopez, and he testified that he told Galvan that it did not matter whether they "were with the Union," as he had checked on them on Saturday and "they were doing an excellent job, . . . their production was great."

It is undisputed that the Respondent's payroll weekends on Tuesday. The Haros and Richardo Lopez had been hired on a Friday, after which Fred Morales had told them on a number of occasions that they needed to come into the office and fill out their employment paper work by Tuesday at the latest, so that they could be paid for the first workweek. According to Morales, that was the reason why he had the three men report to the office on Tuesday, June 18, which he testified was unrelated to his having learned the men were affiliated with the Union. Morales claims he was unconcerned that the men may have been union supporters, and that all he cared about was the quality of their work.[7]

In any event, on the morning of Tuesday, June 18, the Haro brothers and the man known to the Respondent as Ricardo Lopez arrived at the warehouse office to complete the payroll paperwork. In the office were the Morales Brothers and Ray Skaggs. The Respondent's supervisors were unaware at the time that Lopez was secretly tape recording the conversation. (R. Exh. 21.)[8] The conversation began with Albert Morales asking each man for his "I.D. and social security card." Following some general conversation, Fred Morales, who had apparently been handed Lopez' documents said, "Hey, brother,[9] this ain't under Ricardo." Lopez responded, "Yea, I used an alias name to get hired because if I would have used my name I probably wouldn't get hired." Fred Morales replied, " I got it under Ricardo Lopez, that's the name that you have given me." Albert Morales interjected, "We're going to have some problems on that bro." Fred Morales asked," Do you have any I.D. that says Ricardo Lopez?" Lopez replied, "No, that is my true identity right there." However, it is unclear to me what identification Lopez was referring to. Fred Morales told Lopez, "We're definitely going to have, . . . I don't know if that's going to work bro." At which point the Respondent's supervisors decide they should talk with Lopez in private and, so, they asked the Haros to leave the room.

After the departure of the Haros and in response to a question as to whether his real name was Ricardo, Lopez responded, "No, it's Miguel Aguilar.[10] I am the union organizer for Local 73. You guys probably heard of me." There followed a discussion as to why Aguilar was using an alias during which Fred Morales said, "We are going to have problems there. I thought we hired Ricardo Lopez, so we didn't hire another guy under this name, that's for sure. Why would you give us an alias name?" To which Aguilar responded, "Cause I know if I would have given you guys Miguel Aguilar, would you guys have hired me?"

The conversation went on for several minutes as Aguilar continued to insist that he used an alias because the Respondent had "already heard his name" and would not have hired him if

[6] Subsequently, Galvan was rehired on July 3 as a foreman.

[7] It should be noted that according to the testimony of Jaime Haro, Morales also visited the jobsite on Monday, June 17, at which time he was so happy with the progress of the job that he let the three men leave at 10 a.m. and paid them for a full 8 hours of work. This apparently occurred after the phone call from Galvan when Morales learned the men were affiliated with the Union, which phone call Morales testified took place at about 8 or 8:30 a.m.

[8] Transcripts of the taped conversation were prepared by the Respondent (R. Exh. 20a) and by the General Counsel (R. Exh. 20b), and both versions were admitted into evidence. The tape recording is somewhat difficult to hear and there are differences between the two versions. However, I have listened to the tape a number of times, and I believe that, for the most part, the Respondent's version is more accurate.

[9] It should be explained that Fred Morales has the habit of referring to people he is addressing as "brother." This became obvious when he testified at the hearing.

[10] For the remainder of this decision, I will use the name Miguel Aguilar, when referring to the person previously identified as Ricardo Lopez.

they knew his real identity. Fred Morales indicated that he had heard the name Miguel Aguilar, but there were a lot of people with that name. It then became apparent that the Respondent was not going to allow Aguilar to fill out the necessary paperwork, as Ray Skaggs indicated that Aguilar had "lied" to them, and Fred Morales said, . . . "we just don't have nothing for you right now bro. Not like this."

During the conversation there was a good deal of what I would characterize as "friendly banter" about the merits of union versus nonunion labor. Late in the conversation, Aguilar made the statement, "Actually, I know a lot of labor law." He informed the supervisors that, "My intentions were to organize Quality." There was some additional friendly conversation about Ray Skaggs' relationship with the Union, and whether he knew certain individuals associated with the Union.[11]

As the conversation was nearing its end, Aguilar indicated that if allowed to do so, he would go back to work. Fred Morales told him that, "We need someone to work. I don't need someone to talk all day." Fred asked him, "What's with this shirt that says Union yes? What is that all about?"[12] Albert Morales stated, "I don't even know what he was wearing (inaudible). I don't care if you are Union or not, if you wanted to work, and then come in with that."

Fred Morales made it clear the Respondent was not going to continue to employee Aguilar, telling him, "If you see Ricardo, I would like to talk to him. I don't know what else to say. I don't have nothing for you at this time." Ray Skaggs referred to Aguilar as a "pathological liar" who had "falsified" his identity. There was then some discussion about whether Aguilar could be paid for the work he had performed under the name of Ricardo Lopez. Ray Skaggs indicated, as he had earlier, that the Respondent's attorney would have to decide whether or not Aguilar would be paid.[13] The conversation then finally ended with the parties exchanging pleasantries.

As I noted earlier, there are some differences between the Respondent's transcript of the taped conversation and that of the General Counsel, which differences I resolved generally in favor of the Respondent. For example, the General Counsel's version indicates that Aguilar showed the supervisors his "union business card." While he may well have done so, the tape does not record any mention of this business card. (GC Exh. 3.) Also, in the General Counsel's transcript Fred Morales tells Aguilar "no" in response to a question from Aguilar as to whether the Respondent would have hired him if he had initially given his real name. The Respondent's transcript contains no such response, and I failed to hear it when I listened to the tape. Further, I heard various remarks from Ray Skaggs about Aguilar having engaged in "misrepresentation," which remarks were reflected on the Respondent's transcript, but not on that of the General Counsel. Finally, the Respondent's version reflects Albert Morales telling Aguilar that he would not have cared if Aguilar was with the Union or not. While I clearly heard this statement on the tape, it is not found on the General Counsel's transcript.

At this point it is appropriate to note that the General Counsel's transcript was apparently prepared by Miguel Aguilar, who was, of course, the person who surreptitiously recorded the conversation. I believe that in preparing the transcript, he has taken certain "liberties" with what is recorded on the tape. His intentions being to place himself in the best possible light, while making the Respondent's supervisors appear as malevolent as possible. For the most part, I did not find Miguel Aguilar to be a credible witness. To begin with, he was willing to falsify his identity in order to achieve his initial goal of being hired. While his ultimate objective in attempting to organize the Respondent's employees was certainly legitimate, and obviously lawful, his use of an alias was not legitimate.

Further, I found Aguilar's testimony to be inconsistent, inherently improbable, and generally incredible and unworthy of belief. His testimony regarding the point during his meeting with the supervisors when he allegedly gave them his union business card is not supported by the affidavit that he gave to the General Counsel during the investigation of this case. (See R. Exh. 23.) After further cross-examination, he incredibly testified that the reason the tape recording of the meeting did not reflect the events as he testified to them was because the various participants at the meeting were talking over each other. Also, his testimony is at variance with other witnesses whom I find credible. Such is the case with installer Jacinto Fajardo, whose testimony regarding his confrontation with Aguilar, I will set forth in detail later in this decision.

Finally, I found Aguilar's demeanor while testifying to leave much to be desired. He appeared nervous, uncomfortable and on edge, more so than would be natural for someone testifying in a Board proceeding. When being cross-examined, he became testy and argumentative. All in all, his testimony did not instill me with confidence that he was telling the truth. To the contrary, I have concluded that he was not credible.

Regarding the matter of credibility, at this point I should note that in general, I did not find the testimony of either Jaime or Juan Carlos Haro to be particularly credible. To begin with, both men testified that prior to June 14 they had never heard Miguel Aguilar referred to as Ricardo Lopez, and they did not know that he was going to use an alias in attempting to get a job with the Respondent. This I find totally implausible, as the Haro's were obviously involved with Aguilar and the Union in the organized efforts to place union "salts"[14] with the Respondent. Further, as will become apparent later in this decision, other witnesses who I found credible frequently disputed the Haros' testimony. Also, the Haro brothers' testimony was often confusing and inconsistent, and some of it was inherently implausible. Their demeanor when testifying, especially on cross-examination, tended to be antagonistic, and they did ap-

[11] Ray Skaggs was a longtime union member and official, who had "retired" with a union pension.

[12] It is unclear whether Aguilar was wearing this shirt earlier that morning at work, or put it on just prior to entering the office.

[13] Subsequently, Aguilar was paid for the work he performed under the name of Antonio Lopez. However, Aguilar was paid only after he filed a complaint with the State of Arizona Labor Board. (See R. Exh. 1 and 2.)

[14] Individuals hired as employees who have as an object attempting to organize an employer's employees are customarily referred to as union "salts."

pear to have an "attitude." Over all, their testimony did not appear genuine and truthful.

The day following the discharge of Miguel Aguilar, Wednesday, June 19, Fred Morales went to a jobsite where he had a conversation with the two Haro brothers. The Haros and Morales testified at significant variance regarding that conversation. Although as noted above, I generally found the Haro brothers not to be credible, I do believe their testimony that Morales started the conversation by asking them if they knew Miguel Aguilar, whether they knew that he was affiliated with the Union, and whether they were also involved with the Union. It is logical that Fred Morales would have asked them such questions, since they had introduced Aguilar to him as their friend on June 14, and they had been asked to leave the office on June 18 before there was any discussion about the Union. Morales would certainly have been curious about what they knew of the Union's interest in the Respondent.

At some point in the conversation, the Haros told Fred Morales that they had each paid the Union $60, but that they were uncertain as to whether that meant that they were union members or not. There followed a conversation about whether the Haros might have a "problem" with the Union, if in fact they were members. While it is unclear who first mentioned a possible "problem," I believe that the testimony of Fred Morales was credible when he testified that the reference to a "problem" was in the context of a problem with the Union, not with the Employer, as testified to by the Haros. This makes sense, as Morales further told the Haros that while he did not know the answer to the question, he knew somebody who did, and he would get back to them.[15] Further, I believe that the testimony from the Haro brothers that Morales told them not to talk with Aguilar or to take any "papers" from him is likely accurate. From his conversation with the Haros, Morales was of the impression that they were really not involved with Aguilar in an effort to organize the Employer. As he had just fired Aguilar, it is logical that Morales would have wanted the Haros to avoid Aguilar and, accordingly, I believe that he made the statement advising them to do so.

Later that day, June 19, Fred Morales called Jaime Haro at his home. Morales informed Jaime Haro that he had spoken to Ray Skaggs, as promised. Morales said that according to Skaggs, the Haros could not have joined the Union for only $60, and that what they must have done was pay a permit fee, which would allow them to be referred to work out of the union hiring hall. Further, Skaggs indicated that under those circumstances, the Union would not be able to punish the Haro brothers for working for the Respondent, a nonunion contractor. According to Jaime Harro, after Morales reported what Skaggs had to say, Morales repeated what he had said earlier that day, namely that the Haros should not talk with nor take any papers from Miguel Aguilar. Once again, for the reasons I previously stated, I believe that this conversation about Aguilar likely occurred in the manner testified to by Jaime Haro.

[15] This reference was to Ray Skaggs who, as a former union member and officer, had some knowledge regarding the Union's ability to discipline its members for working for a nonunion contractor, such as the Respondent.

On the afternoon of June 21, an employee meeting was held at the Respondent's warehouse. According to the testimony of Fred Morales, he and his brother made the decision to call this meeting because of information they had received that Miguel Aguilar had threatened installer Jacinto Fajardo. As noted above, I found Fajardo to be a credible witness. He testified in a mild, unassuming way, and impressed me with the genuineness of his testimony. He did not appear to be exaggerating or embellishing his testimony. Rather, he seemed shy and somewhat reluctant to tell his story. I do not believe that there was any reason for him not to be truthful. Fajardo's testimony was strongly disputed by Miguel Aguilar, who I have found to be an incredible, unreliable witness.

According to Fajardo, one evening in June as he and his wife were leaving home to do their wash, Miguel Aguilar arrived at his house.[16] Aguilar told Fajardo that he had something important to tell him. He was not dissuaded by the fact that Fajardo said he was too busy to talk. Aguilar said that he had "called Immigration," and that "they were going to show up Monday morning at the warehouse." Further, Aguilar told Fajardo that he wanted Fajardo to "work with him," and that "nothing was going to happen with them." While Fajardo is not the most articulate of witnesses, and he testified in a somewhat cryptic fashion, it appears that Aguilar, who had been trying to get Fajardo to quit the Respondent and affiliate with the Union, was informing him that the Immigration and Naturalization Service (INS) would be making raids at the Respondent's warehouse facility and jobsites. Aguilar was warning Fajardo, and offering him the opportunity to affiliate with the Union, which allegedly would protect him from the INS. According to Fajardo, he was scared that he might lose his job, and so he mentioned what had happened to fellow employees Carlos Sanchez and Estavan (Steve) Leyva.[17]

Leyva informed Fred Morales about Fajardo's concerns, and Fred, in consultation with his brother, decided that an employee meeting needed to be called. The Morales brothers testified that there is a significant fear of the INS in the Hispanic community and, the Respondent's work force being comprised of almost all Hispanics, they decided to address the concerns at an employee meeting. Fred and Albert Morales presided over the meeting, at which approximately 30 employees were present. It should be noted that there are essentially two versions of what transpired at the meeting. The Haros have one version, and virtually all the other witnesses who testified have another version. For the reasons enumerated earlier, I did not find the Haro's credible and, so, unless indicated otherwise, the version

[16] This was apparently not the first time that Aguilar had come to Fajardo's home to visit and talk about the union organizational campaign.

[17] Both Sanchez and Leyva were credible witnesses who testified about their conversations with Fajardo and added some of the details he had given them, which details Fajardo had for some reason not mentioned when he testified. Leyva was a particularly credible witness as at the time of the hearing, he was no longer employed by the Respondent but, rather, at Wal-Mart. He obviously had no reason to color his testimony one way or another.

of events set forth is a composite of the testimony of the other witnesses who were present for the meeting.[18]

The meeting was started by Fred Morales, who explained that there had been a threat made by Miguel Aguilar to contact the INS and have them come to various worksites on Monday and check the work authorization papers of the Respondent's installers. Morales called upon Jacinto Fajardo to tell his story, and Fajardo recited the incident when Aguilar arrived at his home. Morales told the employees not to worry, as all their work authorization papers were in order. Further, he indicated that there was no way that the Union could protect them any more than the Respondent could. If an employee wanted to leave the Employer and affiliate with the Union, he was certainly free to do so. However, any such employee should understand that a new employee might then fill his job and, therefore, if things did not work out and the employee wanted to return to the Respondent, there might not be a job to return to.

The consensus of the witnesses was that, contrary to the testimony of the Haros, Fred Morales did not tell the employees that they could not talk with Miguel Aguilar, or other union organizers, while on a jobsite. Employees were not instructed not to talk about the Union while at work. Further, there was no statement made to the employees that they could not receive union pamphlets or other union material while at work. Also, nothing was said about employees being fired because they affiliated with the Union. I believe that the Haros were either not paying attention to what was being said, or they are relying on "selective memory" of what was said at the meeting. They may have simply recalled what Fred Morales told them on June 19, rather than what Morales said to the assembled employees on June 21. It is interesting to note that they actually remember very little of what was said by Jacinto Fajardo at the meeting, although clearly his presentation was a significant part of the meeting. However, they claim to recall in much detail what Fred Morales allegedly said, although the other employees who were present dispute most of their recollection.[19]

However, the area in which all agree is that Fred Morales did make a comment about paying employees for bringing him a body part from Miguel Aguilar. Morales admits making such a statement, but contends that it was merely a joke, and understood as such by the assembled employees, who all shared a good laugh. The employees at the meeting seem to disagree as to specifically what body parts were mentioned, or how many times they were mentioned. Also, the Haros do not characterizes the comment as being made in jest, although most of the other employees do. To the extent that the Haros also suggest that Fred Morales made a similar offer to reward employees who cut off a body part of any other employee engaging in union activity, I conclude that no such threat was made. Certainly, no other employee present at the meeting testified that such a statement was made. Finally, no other employee supported the testimony of the Harlos that Fred Morales disparaged the Union in any way, including making a statement that the Union had cheated the Haro brothers out of $60 dollars each.

The Haros continued to work for the Respondent until they were discharged on July 26. There is much controversy regarding the events leading up to their discharges. According to the testimony of Jaime Haro, on July 8 he and his brother were working at a jobsite at the Supai Elementary School. To that date, the Haros had always worked together. Allegedly, foreman Antonio Galvan approached Jamie Haro and asked him whether he, his brother or his father, Francisco Haro, were members of the Union. Galvan is also alleged to have questioned Jamie about why Miguel Aguilar was fired. Jamie Haro claims that he told Galvan that he and his brother were members of the Union, but that his father was only a union supporter. Thereafter, Juan Carlos was moved to a different jobsite. It is Jamie Haro's contention that the next day, July 9, Galvan told him that he was not doing his job and that since he was from the Union he had "to work and prove that he can work." Galvan then allegedly assigned him an amount of work for the day that no installer could complete in a single day. This included ductwork, which Jamie Haro claims is arduous and is usually performed by beginning installers. Jamie Haro further contends that Galvan promised him that he could work as normal, if he would end his support for the Union. It is claimed that Galvan went so far as to threaten that Jamie would get beaten up if he continued to try and organize the Respondent's employees.

Antonio Galvan denied treating Jaime Haro any differently because he supported the Union. According to Galvan, beginning on July 9, Jaime's work production fell to unacceptably low levels. He claims to have spoken repeatedly to Jaime about his lack of production. It was Galvan's testimony that Jaime installed less than one half the amount of roll insulation that should have been installed by an insulator with his experience. According to Galvan, Jaime's response was simply that, "he couldn't do any more." On July 11, Jaime's production was so low that Galvan moved him to another part of the jobsite where the work was easier, but Jaime's production remained very low. His response to Galvan's continued inquiry as to why the production was so low was, "you can't get anything more out of me." Also, Jaime informed Galvan that, "being at work for eight hours was enough." The two men had a number of discussions about duct wrap, with Jaime complaining that he should not have to perform that type of work, and Galvan telling Jaime that an "able installer" has to be able to install every type of insulation required on a jobsite. Galvan testified that the only time the Union was mentioned was when Jaime informed him that, " I can work Union, and I can work Quality Mechanical right now, and Quality can't do anything about it." Jaime continued to install rolls of insulation at less than half the expected rate and on July 12 Galvan again spoke to him about the problem. Jaime's response was, "being eight hours on the ladders was enough." Galvan, who had seen Jaime work before

[18] These employees include the Morales brothers, Carlos Sanchez, Estevan Leyva, Jacinto Fajardo, Lazaro Campos, Alberto Montes, Javier Gonzales, and Ricardo Gonzales.

[19] To some extent, it is not surprising there was a significant disparity between the recollections of the various witnesses to the events of June 21. It appears that the meeting was held in an atmosphere of much levity, with employees carrying on a number of separate conversations at the same time, and much laughter and general noise. In that respect, it is fortunate there was any general consensus among most of the employees as to the substance of what was discussed.

this alleged slow down in production, testified that he knew that Jaime could perform at a much higher level.

As noted earlier, I have concluded that Antonio Galvan was neither a supervisor nor an agent of the Respondent as defined by the Act. Accordingly, alleged statements made by Galvan about Jaime Haro's union activity would not be attributable to the Respondent. However, even assuming that Galvan was a supervisor or agent, I am of the view that no statements were made by Galvan as could be considered to have interfered with, restrained, or coerced Jaime Haro in the exercise of his Section 7 rights. As I have indicated, I found Jaime Haro to be a generally incredible witness. I do not believe that Galvan interrogated Jaime about his union membership. After all, it is undisputed that on approximately June 17, Galvan informed Fred Morales that Morales had just hired three union supporters, meaning Miguel Aguilar and the Haros. As Galvan knew about the Haros' union affiliation, he would have had no reason to ask such a question. Further, I believe that Galvan testified in a credible fashion. I believe that he was concerned with Jaime Haro's lack of production beginning about July 9. In my view, his conversations with Jaime were unrelated to Jaime's union activity. On the other hand, it appears that it was Jaime who tried to connect the amount of insulation that he was installing with his affiliation with the Union. Also, I do not believe that Galvan threatened Jaime with physical harm, reprisals, or discharge. I see no credible evidence that Galvan separated the Haro brothers because of either brother's union activity, or gave Jaime more onerous working conditions, or increased his workload. The weight of the evidence strongly supports Galvan's contention that every insulator was expected to install duct wrap, not simply beginning insulators. After reviewing the credible evidence, it is clear to me that the only problem that existed between Jaime Haro and Antonio Galvan was caused by Jaime's sudden lack of production beginning about July 9, and his refusal to offer a reasonable explanation for the decline in production.

It is the Respondent's contention that the Haros had been good employees when they first worked for the Employer in the fall of 2002, and continued to do good work when they were rehired on June 14. However, according to the Respondent's witnesses, beginning about July 9, the Haros' production was dramatically reduced and their attitudes became hostile. In addition to Antonio Galvan, other foremen also began to have problems with the Haros. On July 15, Ernesto Arias Montes was in charge of a crew that included Jaime Haro. According to Montes, Jaime was only installing about half as much insulation as the other members of the crew. Montes spoke with Jaime about his poor production, and Jaime responded that, "he was the Union, he could do whatever he wanted." Montes testified that Jaime's production also remained very low the following day. I find no reason not to credit the testimony of Montes. Jaime Haro's testimony that his production was equal to that of other employees, and that he was given more difficult work to perform than others, seems no more credible than the rest of his testimony.

On July 19, Albert (Peely) Montes was in charge of a crew that included Jaime Haro. That day Haro was assigned to insulate fan coils. He finished two fan coils, which Montes testified was less than half the number expected of an installer with his experience. I believe that Montes has testified credibly.

Lazaro Campos was another one of the Respondent's foremen who testified at the hearing. He was in charge of a crew on which Juan Carlos Haro worked for about 2 weeks, starting approximately July 10. Regarding Juan Carlos' production, Campos testified that, "He wasn't doing hardly anything compared to the other guys." On that first day Campos asked Juan Carlos why he was "moving so slow?" Haro replied, "If I'd pay him more, he'd work faster." Later Haro told Campos, "This ain't by contract, that if it's by contract he'd move faster." By this remark Campos assumed that Haro was asking to be paid "by the foot," which was contrary to the method used by the Respondent to compensate installers, that being an hourly rate. Haro mentioned calling Fred Morales to ask him about compensation, at which suggestion Campos decided to call Morales on the spot. With Haro standing there, Campos called Morales and told him that Juan Carlos "was moving too slow and he didn't really want to do anything." At Morales' request, Campos handed the phone to Haro. However, following the conversation between Morales and Haro, there was no improvement in his production.

In addition to low production, Campos noticed that Juan Carlos was not stapling the tape used to patch up holes in the insulation and join together rolls of insulation. This was standard operating procedure for the Respondent, but Haro told Campos that he did not know to do this without being told. Campos asked Haro to go back and place staples where he had neglected to do so. Also, according to Campos, Juan Carlos was working very inefficiently. Instead of cutting a number of pieces of insulation all at one time, he would make a separate trip up and down the ladder to cut insulation each time he needed another piece. In the opinion of Campos, Juan Carlos "was just eating up the clock." On the following day, July 11, Juan Carlos' production remained at about half of what the other installers were doing.

Campos testified that on July 12, Juan Carlos did not show up for work until 9 a.m., although the normal starting time in the summer was 5:30 a.m. According to Campos, he had told Haro the previous day which jobsite to report to, yet Haro claimed he had been sent to the wrong project. In the view of Campos, even if Haro had mistakenly gone to the wrong project, it should not have taken him 3 1/2 hours to locate the right jobsite. Later that day the two men had a confrontation. Campos testified that near the end of the workday, he told Haro where Haro would be working the following day. Campos asked Haro if he heard him and Juan Carlos said he did. However, Juan Carlos walked up to Campos, and according to Campos, "He got in my face and he goes that's the last time you scream at me because you don't know who I am." Compos claimed that Haro said those words "with an attitude," standing about six or eight inches from his face. Further, for the remainder of the workday, Haro allegedly kept "running his mouth," and according to Campos, said, "that I wasn't nothing . . . ."

Campos again worked with Juan Carlos Haro on July 17 and 18, when his production continued to be very low. On the 18th Campos spoke with Juan Carlos a number of times about his

production. On one of those occasions Juan Carlos told Campos, "to do it myself, not to worry about it." According to Compos, Haro made the remark in, "just an angry tone, pissed off." The following day, July 19, Haro's production was once again very low, and the work that he did was "sloppy." Compos testified that Juan Carlos was cutting holes in the insulation that were too big, requiring large amounts of tape to close, and that he was cutting pieces of insulation too long, requiring that the overlap be cut off. This was a waste of material. Compos characterized Haro's work as "ugly."

As I have found with the other foremen, I am of the opinion that Lazaro Campos has testified credibly. His testimony seemed sincere and genuine, and it was internally consistent and inherently probable. It had "the ring of authenticity" to it. Further, as has been noted in detail, I found Juan Carlos Haro to be an incredible witness. Having found both the Haros to be incredible, I do not credit their denials regarding the charge of low production. Further, I am of the view that they both repeatedly demonstrated their poor attitudes toward the Respondent in the period from July 8th to the end of their employment.

The foremen having reported their problems with the Haro brothers, the Respondent's managers decided to begin to document these incidents. Once they were prepared to act, the Respondent's managers decided to confront the Haros with their concerns and obtain the Haros' position on the various incidents. Management prepared documents entitled "Notice of Charges," one addressed to each of the Haros, which were dated July 22 for Juan Carlos (GC Exh. 5), and July 26 for Jaime (GC Exh. 7). The documents were provided to the Haros in both English and Spanish. After an earlier unsuccessful attempt, the "charges" were presented to the Haro brothers on July 26. A meeting was conducted at the Respondent's warehouse office, with the Morales brothers and Ray Skaggs present for management.[20] The Haros were told that they were being paid for their time, and that they were expected to read and respond to the charges. They were provided with forms to use in responding to each charge being made against them. Further, they were told that if they failed to respond to the charges, it would be assumed that the claims being made against them were true, and they could be discharged.

The Haros refused to respond to the charges, and they simply asked for their final checks. They testified that they declined to answer the charges because the charges were nothing but "lies." The Respondent subsequently issued written "Termination of Employment" notices to both Haros that were dated July 27. (GC Exh. 4.)[21] It was the testimony of the Respondent's managers that the Haros were fired because of their low production and poor attitude as set forth in the "Notice of Charges" documents, which charges management considered as undenied since the Haros refused to respond. Further, it is the Respondent's position that by refusing to respond to the charges and requesting their final checks, the Haros were voluntarily "abandoning" their jobs. However, after hearing the testimony of the Respondent's managers, Skaggs and the Morales brothers, it is clear to me that the principal reason given by the Respondent for discharging the Haros was low production and a poor attitude from approximately July 8 until the end of their employment. Of course, it is the General Counsel's position that the Haros were fired because of their union activity, and any other reason stated by the Respondent was merely a pretext.

The complaint alleges that between an unspecified date in June and July 26, a number of union affiliated individuals applied for employment with the Respondent, none of whom were hired.[22] The General Counsel contends that the Respondent failed to consider for hire or to hire these individuals because of their union affiliation. The Respondent contends that any failure to hire or to consider hiring was because the Respondent either had no job opening at the time in question, or because the Respondent was able to fill the positions using its priority hiring system.

Ruben Aguilar, a union member, testified that sometime in June he and his brother, Leo Aguilar, went to apply for work at the Respondent's warehouse office. Leo wore a union T-shirt. The men allegedly spoke with Albert Morales who informed them that the Respondent was not hiring. Aguilar testified that, thereafter, he would call the Respondent's office two or three times a week, and was always told the Respondent was not hiring. The Respondent does deny that Aguilar may have sought a job with it. However, it is the Respondent's stated position that if Aguilar was told that the Respondent was not hiring, it was because that was true at the point that he sought employment.

Union member Jorge Olivera testified that in June or July he went alone to apply for work with the Respondent. He was wearing regular clothes and spoke with Albert Morales about a job. Allegedly, Morales indicated that while there were at the time no openings, he should return in 2 weeks. Again, the Respondent does not deny that Olivera may have sought employment, however, the Respondent does deny that there was any job opening at the time he applied.

Olivera testified that he returned to the Respondent's warehouse on July 26 in the company of union members Solomon Franco and Rafael Martinez. The men were all wearing clothes bearing union insignias. As they got out of Franco's van, they were immediately approached by Ray Skaggs and Albert Morales who informed them they were trespassing. Olivera testified that although he tried to explain that he had been told by Albert Morales to return and determine if work was available, Skaggs said that they were trespassing and that if they did

[20] This meeting was tape recorded by Ray Skaggs. The tape is in evidence as R. Exh. 24. (It also contains other conversations recorded the same day.) A transcript of the recording prepared by the Respondent is in evidence as R. Exh. 25a, and a transcript prepared by the General Counsel is in evidence as R. Exh. 25b. There is no dispute as to what was discussed at this meeting.

[21] Inadvertently, there are two termination letters in evidence for Juan Carlos Haro and none for Jaime Haro. However, this is of no practical importance as it is the Respondent's stated position that the Haros were both fired for the reasons listed in the documents entitled "Notice of Charges," which are in evidence, one for each brother.

[22] In his post-hearing brief, counsel for the General Counsel makes reference to employee-applicants who sought employment with the Respondent on various dates prior to June. As the complaint does not allege violations of the Act prior to June, I am assuming that any reference to earlier events is intended as background information only.

not leave, he would call the police. Olivera alleges that Skaggs said, "They were taking any body that wasn't from the Union." Albert Morales began to take pictures of the three men, who left after being told to do so. They claim not to have seen any "No Trespassing" or "Not Hiring" signs as they entered the Respondent's property.

The Respondent does not deny the substance of these events of July 26 as testified to by the General Counsel's witnesses, with the exception that the Respondent's witnesses, Skaggs and the Morales brothers, do not acknowledge any reference by Skaggs to the Union. However, the Respondent takes the position that the incident testified to by Olivera must be placed in context. The Respondent contends that its private property was under assault on July 26 by union organizers, masquerading as applicants for employment. There were three separate groups of men who descended on the Respondent's property on July 26 in rapid succession, at a time the Respondent had set aside to discuss with the Haros their continued employment with the Employer. Further, the Respondent contends that it was not hiring at the time, and had posted its property with a number of "No Trespassing" signs and had its semipermanent "Not Hiring" sign on display. However, despite their attempt to maintain the privacy of the property, the Respondent's witness contend that they found themselves under, what they believe was, a coordinated campaign by the Union to disrupt their business operation. As evidence of this campaign, the Respondent's counsel during cross-examination obtained the admission from a number of the employee-applicants that on the morning of July 26, they all met with Union Organizer Miguel Aguilar at a local Denny's restaurant prior to appearing in three groups at the Respondent's warehouse. The incident with Olivera, Franco, and Martinez mentioned above was actually the last of the three to have occurred on July 26.

Union member Jose Fred Sanchez testified that on July 1, he and fellow Union member Bruce Annis went to the Respondent's warehouse to apply for work. They were both wearing clothing with the union insignia. According to Sanchez, he asked Fred Morales for a job application and whether the Respondent was hiring. Allegedly, Morales informed them that although the Respondent was not hiring at the time, he would take down their names and phone numbers. However, they were never called.

The Respondent does not deny that these two men may have asked about employment. However, it is the Respondent's position that any failure to hire them was based on either the lack of job openings at the time they applied, or the fact that employment needs were satisfied by means of the Employer's priority hiring system. The Respondent denies that union membership or affiliation had any affect on any of its hiring decisions.

Sanchez also testified that on the morning of July 12, he and Bruce Annis returned to the Respondent, this time accompanied by Union members Richard Chamberlain and Ron Harger, to seek employment. They were all wearing union paraphernalia. Nobody was present at the warehouse, but as they started to leave, a truck drove into the lot and driver Preston Dale Kelly asked them what they wanted. The men asked Kelly if the Respondent was hiring, after which Kelly responded by asking them if they had not seen the "Not Hiring" sign. Kelly walked the men over to the fence around the property, which allegedly had an "Employees Only" sign on it, but nothing about not hiring. According to Sanchez, Kelly then got on his radio and spoke with a "superintendent."[23] Kelly is heard to say, "Hey, we've got some more of these union guys that want to look for work here." Sanchez claims that the response was, "Tell them we don't have any." Chamberlain's testimony is somewhat different. He claims that Kelly called "somebody" on the radio, and asked if the Employer was hiring. According to Chamberlain, the voice on the other end asked, "Are they Union?" Kelly responded in the affirmative, at which the unidentified voice allegedly said, "I don't have any work for union guys." The men then left the property.

According to the testimony of driver Dale Kelly, when he went to the fence with the job seekers and saw that the "Not Hiring" sign was missing, he called superintendent Fred Morales to inquire if the Employer was hiring. Morales told him the Respondent was not hiring, and after he so informed the men, they left the property. Both Kelly and Morales deny that any mention was made of the Union. Further, the Respondent continues to take the position that if job seekers were told that no jobs were available, then that was the situation at the time that they asked about work. The Respondent contends that union membership or affiliation were not factors in deciding whether or not to hire candidates for employment.

Regarding the incident of July 12, to the extent that it is necessary to resolve the variance in the witness testimony, I credit the testimony of Kelly and Morales that union membership or affiliation was not discussed. As I noted earlier, I found Fred Morales in particular to be a credible witness. Kelly supports his testimony. Further, Sanchez and Chamberlain have somewhat different remembrances of what was said. Significantly, the other witness to testify about this incident, Ron Harder, apparently did not hear any comments by Kelly or the person on the radio about the Union or union members. Finally, I find it very difficult to believe that an intelligent individual like Fred Morales would make such a statement on an open radio, with union members obviously in the immediate vicinity.

Trini Castaneda, union member, testified that he and Jose Flores, also a union member, went to the Respondent's warehouse in mid-June to apply for work. However, Flores places the date as July 26. Based on Flores' testimony, plus that of the Respondent's witnesses, as well as certain photographs in evidence, I place the incident as having occurred on July 26. According to Castaneda, he and Flores had originally gone to the Respondent seeking employment in mid-May, at which time Fred Morales had told them there were no openings, but they should try again in 2 weeks.[24] Both men returned on July 26 wearing union T-shirts. Allegedly, they did not even get a chance to get out of their truck, as they were approached by

[23] The witness does not indicate how he knew this was a superintendent.

[24] As the complaint does not allege any incidents in May, it is assumed that this event is not being alleged as a violation of the Act. This is apparently because the men were not wearing any union insignias, and there is no contention that the Respondent was aware at the time that they were union members.

three men who immediately began yelling at them to leave because they were trespassing. One of the three men is alleged to have said that if they did not leave, the police would be called, while another of the men began to take pictures of them and their truck. Castaneda testified that one of the three men pointed toward the fence around the property, but that he did not see a "No Trespassing" sign. Not being given the opportunity to speak, and being concerned that the police would be called, Castaneda and Flores left the facility.

It is the testimony of the Respondent's three witness, Ray Skaggs and the Morales brothers, that this was the first of the three groups of union organizers to descend on them on the morning of July 26. As mentioned above, they considered this as an intentional effort to disrupt the Respondent's business operation. It is the contention of the Respondent that it had no job openings on that date and it had, therefore, posted its property with "No Trespassing" signs and displayed its semi-permanent "Not Hiring" sign. As the Respondent's managers felt that their property was under assault, and their business was being deliberately disrupted, they attempted to get the union organizers off the property as quickly as possible. To that end, they informed the union members that they were trespassing and that unless they left immediately, the police would be called. In an effort to have evidence of the incident if the need arose, pictures were taken of the union men and their vehicle.

The second of the three incidents that occurred on July 26 appears to be the most significant of the three. It occurred shortly after the Haros had departed the facility, when Miguel Aguilar and Harold Hamman, another union member, arrived allegedly seeking employment. According to Aguilar, as soon as they pulled into the Respondent's parking lot in Hamman's truck, Ray Skaggs and the Morales brothers came running toward them. Albert Morales was taking pictures of them and the truck, while Skaggs was carrying a tape recorder. Unknown to the Respondent's managers, Aguilar was also taping the incident, but surreptitiously. Aguilar asked if he could have his job back. However, it is unclear whether the supervisors heard him as Skaggs, in a loud voice and rapid fashion, repeatedly tells Aguilar and Hamman that they are trespassing, and that unless they leave immediately the police will be called. Hamman apparently got out of his truck, but did not get the opportunity to say anything. It appears that the police were actually called, at which point the two union men decided to leave. They drove away in Hamman's truck with Aguilar allegedly making a comment to Skaggs about his ownership of the business. Both Aguilar and Hamman deny seeing any "No Trespassing" or "Not Hiring" signs. They contend that they were merely on the property to apply for work.

As noted, the Respondent contends that this was simply a further attempt by the Union on July 26 to disrupt its business. Having allegedly posted the property with "No Trespassing" and "Not Hiring" signs, the managers contend that Aguilar and Hamman had no legitimate reason to be on the property. It is the opinion of Ray Skaggs that Hamman was Aguilar's "enforcer" and was on the property to attempt to intimidate him. Hamman is a large man, considerably younger, and in better physical shape than Skaggs, who is in his mid-60s. According to Skaggs, Hamman approached him in a threatening manner, and he was fearful for his physical safety. Also, Skaggs contends that after calling the police, and as the two union men were leaving the facility, Aguilar said to him, "I'm going to kill your ass." In fact, both the police and the paramedics arrived at the facility, and both filed reports, which are in evidence. (R. Exhs. 26 and 27.) Ray Skaggs, with an elevated blood pressure, subsequently left work early in the company of his wife.

As I have mentioned, the events of July 26 have all been tape recorded. Ray Skaggs recorded the meeting with the Haro brothers, as well as the three separate visits by union affiliated job seekers. According to Skaggs, he had the tape recorder available because it was his intention to record the meeting with the Haros. He decided to use the recorder to make a record of the actions of the union affiliated men because he was of the belief they were violating the law by trespassing, at a time when the Respondent was clearly not hiring. Skaggs indicated that for the same reason, the Respondent's managers decided to take pictures of those people they considered trespassers. The Respondent's tape recording of the events of July 26 was admitted into evidence. (R. Exh. 24.) Also admitted into evidence was a transcript of that tape recording prepared by counsel for the Respondent (R. Exh. 25a), and a transcript of the same recording prepared by counsel for the General Counsel. (R. Exh. 25b.) Further, as was noted earlier, Miguel Aguilar secretly tape recorded his confrontation with Skaggs and the Morales brothers on July 26. That tape recording was admitted into evidence. (GC Exh. 15.) Also admitted into evidence was a transcript of that tape recording prepared by the Union (GC Exh. 16), and a transcript of the same recording prepared by counsel for the Respondent. (R. Exh. 22.)

In their post-hearing briefs, the parties have engaged in a "battle of the tapes and transcripts" to support their various positions and theories. I have listened to each tape a number of times and reviewed the transcripts, comparing the transcripts to the actual recordings. It is not surprising that the various transcripts are at variance, as the tape recordings were made in less than ideal conditions, and sound quality varies greatly, depending upon the distance of the speaker to the receiving device. Also, individuals are often speaking at the same time, making it difficult, if not impossible, to determine exactly what was said. Portions of conversations are often inaudible. That being said, most of the conversations are understandable. A listener to the tapes is certainly able to get the "flavor" of the various conversations. Further, there really is not a great difference in the conflicting transcripts submitted by the parties, and I do not believe that those differences that do exist are over material matters.

Following my review of the tapes of the three incidents when union affiliated individuals came to the Respondent's facility on July 26, I believe that some matters are obvious. Although I could find no direct mention made of the Union, I have no doubt that Skaggs and the Morales brothers were aware that all the "visitors" to the facility were affiliated with the Union. Further, I have no doubt that they were also aware that these "visitors" had the intention of seeking employment. Having posted the property with "No Trespassing" and "Not Hiring" signs, the Respondent's managers were clearly unhappy to find that, despite their best efforts, they had a steady stream of "ap-

plicants for employment." The "employee-applicants" were attempting to ask the Respondent's managers for jobs, and the managers were intent on immediately informing the applicants that they were trespassing, needed to leave, and were subject to arrest if they did not do so. It is obvious from the tapes that Skaggs and the Morales brothers did not want to hear anything the applicants had to say but, rather, were determined to order them off the property.

Specifically regarding the confrontation between the Respondent's managers and Miguel Aguilar and Harold Hamman, there is nothing on either tape as would reflect Aguilar making any threat to Ray Skaggs. The tape recorded by Miguel Aguilar does end with a question by Aguilar to Skaggs, regarding whether Skaggs owns the business. However, I cannot determine if Aguilar added this question after the incident, to hide a deleted threat by Aguilar to Skaggs, which is a claim made by counsel for the Respondent at the hearing and in his post-hearing brief. In any event, I do not believe that even if Aguilar made the threat to Skaggs, "I'll kill your ass," that it would in any way alter the outcome of this case. Any such threat by Aguilar would have been made at the end of the conversation, and after Skaggs had repeatedly ordered Aguilar off the property as a trespasser. Finally, I would note that Harold Hamman is heard to say nothing on either tape. Therefore, it is not possible to determine from the tapes whether he menaced Ray Skaggs in any way, as is alleged by Skaggs.

2. Failure to hire or consider for hire employee-applicants

In *Wayne Erecting, Inc.*, 333 NLRB 1212 (2001), the Board citing *FES*, 331 NLRB 9 (2000), set forth a framework to analyze refusal-to-consider and refusal-to-hire allegations. The Board stated in *Wayne Erecting, Inc.*, that in order to establish a discriminatory refusal-to-consider violation under *FES*, the General Counsel must show: (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. In order to establish a discriminatory refusal-to-hire violation, the General Counsel must establish: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once the General Counsel has met his initial burden for the refusal-to-consider and refusal-to-hire, respectively, the burden shifts to the respondent to show that it would not have considered or hired, respectively, the applicants even in the absence of their union activity or affiliation.

In the complaint before me, the General Counsel has alleged that on various dates in June and July, the Respondent failed and refused to hire or to consider for hire employee-applicants Jose Trinidad Castaneda, Jose Flores, Solomon Franco, Rafael Martinez, Ruben Aguilar, Miguel Aguilar,[25] Jorge Olivera, Bruce Annis, Fred Sanchez, Richard Chamberlain, Ron Harger, and Harold Hamman. There is no dispute that each of these men was a member of the Union, and they all had significant experience in the insulation industry as installers. The testimony and other evidence established as much, and the Respondent never offered rebutting evidence. Further, I conclude that on the date each of them appeared at the Respondent's warehouse to apply for employment, as alleged in the complaint, that the Respondent was aware that they were affiliated with the Union. The Respondent does not really deny knowledge of union affiliation, merely that it was not a factor that the Respondent considered.

Ray Skaggs testified that the Respondent hired installers in March, April, May, June, and July 2002. Fred Morales testified that the Respondent hired installers in June and July. There is no dispute, and the Respondent's payroll records establish, that a number of installers were hired, or "re-hired," in the months of June and July. (GC Exh. 8.) Those are the months when it is alleged in the complaint that the Respondent failed and refused to hire or consider union affiliated applicants. The Respondent does not contend that it considered any of these individuals for employment, alleging that under its priority hiring system, there would have been no vacancies at the time these union affiliated applicants sought employment.

The only issue remaining in dispute, which the General Counsel must establish in order to show a prima facie case of an unlawful refusal-to-hire or refusal-to-consider, is the matter of union animus by the Respondent. While the Respondent denies that it exhibited any animus toward the Union, I conclude that the evidence establishes otherwise. As will become apparent later in this decision, I have found that the Respondent engaged in significant violations of Section 8(a)(1) of the Act. These included the interrogation of employees regarding their union affiliation, creating the impression of surveillance of employees' union activity, prohibiting employees from interacting with union organizers, offering money to employees who harmed a union organizer, threatening employee-applicants with trespassing and to summon the police because of their union affiliation, and by photographing employee-applicants because of their union affiliation.

In my view, the General Counsel has met his burden, and has established a prima facie case in support of both the refusal-to-hire and the refusal-to-consider allegations in the complaint. However, the burden of proof then shifting to the Respondent, I conclude the Respondent has met its burden and established that it would not have hired or considered for hire the employees named in the complaint, even in the absence of their union affiliation. The Respondent's managers all testified about the priority hiring system utilized in staffing projects. This testimony remained largely unrebutted by the General Counsel. Fred Morales testified that the system has been in place for at least the 7 years that he has been employed by the Respondent.

As was described earlier in detail, the Respondent's priority hiring system first attempts to utilize existing employees who can be moved to correct staffing imbalances on its projects.

[25] While the complaint does not specifically allege the Respondent's refusal-to-hire or refusal-to-consider Miguel Aguilar on July 26, it is clear that the issue was fully litigated at the hearing, and both counsel for the General Counsel and counsel for the Respondent discussed the matter in their respective briefs. Therefore, I consider this issue before me for decision.

Where this cannot be accomplished, the Respondent will contact former employees who were previously laid off because of an economic reduction-in-force. Fred Morales testified that the Respondent usually has no difficulty in obtaining additional insulators by "rehiring" these individuals. However, when this "recall" is inadequate, the Respondent will seek to hire new employees who have been recommended by existing employees. Using this method, the Respondent is able to staff its projects with a stable, dependable, and productive work force.

According to Fred Morales, it is very rare that the Respondent would need to hire a new employee who had not been recommended by an existing employee. So rare in fact, that the Respondent has a semipermanent sign on its warehouse gate that reads "Not Hiring," which is very seldom covered over. Morales testified that he could not recall anyone that the Respondent had simply hired "off the street," meaning without a recommendation from an existing employee. The Respondent's managers testified that the Respondent employs insulators with varying degrees of experience, from none to many years at the craft. Counsel for the General Counsel closely cross-examined Fred Morales regarding this issue. However, Morales' testimony remained consistent, that being that while the Respondent sometimes hires new employees with no experience, those new employees have always been recommended by existing employees. Numerous examples were given by Morales in response to counsel for the General Counsel's questions.

The Respondent's managers indicated that because of the method the Respondent uses in hiring employees, it has no formal application process and does not take "job applications" from those individuals seeking employment. The Morales brothers testified that when an individual seeking work appears at the warehouse office, he is told what the present employment situation is like, and usually that means that there is no work available. Allegedly, vacancies do not last very long and the Respondent has no difficulty in finding employees, either "rehired" former employees or "new" employees hired with recommendations from existing employees. It is the Respondent's position that those employee-applicants named in the complaint who appeared at its facility asking for work prior to July 26 were told that the Respondent was not hiring, because at the time they sought employment that was the situation. There were no jobs available. Regarding the events of July 26, it is the Respondent's position that it was under a coordinated assault intended to obstruct its normal business operation. For that reason, it contends that it advised those it considered trespassers to leave its property. However, it is apparently still the Respondent's position that there were no job vacancies on that date either and, so, it would not have considered or hired the "employee-applicants," under any circumstances.

Counsel for the General Counsel was not able to point to a single employee who was hired during the period set forth in the complaint without having been recommended by an existing employee or having previously worked for the Respondent. As noted, I found the Morales brothers to be generally credible, and I believe their testimony regarding the priority hiring system utilized by the Respondent. This type of a priority hiring system has been found by the Board not to be a violation of the Act, as it constitutes a nondiscriminatory method for an employer to attempt to gather a dependable, stable, and productive work force. Under existing Board law, the Respondent's hiring policy designed to give preference to former employees and those employee-applicants being recommend by existing employees is a legitimate practice. *Brandt Construction Co.,* 336 NLRB 733 (2001), petition for review denied *IUOE Local 150*, 325 F.3d 818 (7th Cir. 2003); and *Zurn/N.E.P.C.O.*, 329 NLRB 484 (1999).

Based on the above, I conclude that the Respondent has met its burden of proof and established that it would not have hired or considered for hire the union affiliated applicants for employment named in the complaint, even in the absence of their union affiliation. Accordingly, I find that the Respondent's conduct did not violate Section 8(a)(1) and (3) of the Act. Therefore, I shall recommend that complaint paragraphs 6(a), (b), (d), (e), (f), (g), (h), (i), (m), (n), (q), and (r) be dismissed.

3. Alleged unlawful conduct by Fred Morales on June 19

The complaint alleges in paragraph 5 that superintendent Fred Morales engaged in a number of instances of unlawful conduct on June 19 in violation of Section 8(a)(1) of the Act. These instances involve Morales' conversations with the Haro brothers following the discharge of Miguel Aguilar. As was noted above in detail, although I find the Haros in general not to be credible, I do believe their version of the events of June 19. As such, I conclude that the morning following Aguilar's discharge, Morales questioned the Haros on a jobsite about whether they knew Miguel Aguilar, if they knew that he was affiliated with the Union, and whether they were also involved with the Union. Morales would have been naturally curious about the Haros' relationship with Aguilar, who they had previously described as their "friend," and about what they knew of the Union and its interest in the Respondent.

The Board looks to the "totality of the circumstances" in determining whether a supervisor's questions to an employee about his union activities were coercive under the Act. *Rossmore House,* 269 NLRB 1176 (1984), affd. sub nom. In *Medcare Associates, Inc.*, 330 NLRB 935 (2000), the Board listed a number of factors considered in determining whether alleged interrogations under *Rossmore House* were coercive. These are referred to as "*Bourne* factors," so named because they were first set forth in *Bourne v. NLRB,* 332 F.2d 47, 48 (2nd Cir. 1964). These factors include the background of the parties relationship, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of the reply.

In the case at hand, the Haros were recently rehired employees, whose "friend," Miguel Aguilar, had been fired only the day before. They had reason to be concerned. The information sought was their knowledge of and participation in union activity, specifically an attempt to organize the Respondent. Obviously, this was rather sensitive information, about which they had reason to believe the Respondent might take adverse action against them. The questioner was Fred Morales, the Respondent's superintendent and the Haros' immediate supervisor. Morales apparently questioned the Haros on a jobsite away from any other employees. This must have conveyed a certain

importance of these matters to the brothers. The Haros were not entirely truthful with Morales, apparently because they feared if he learned the extent of their union affiliation and activity, he might take action against them. In my opinion, these were reasonable beliefs on the part of the Haros.

Further, I believe that this conversation continued with Morales cautioning the Haros not to talk with or accept any "papers" from Miguel Aguilar. This warning was repeated later in the day when Morales called Jaime Haro at his home to give him some information about the Union that he had obtained from Ray Skaggs. Accordingly, I believe that the totality of circumstances establish that the interrogation by Fred Morales of Jaime and Juan Carlos Haro had a reasonable tendency to restrain, coerce, or interfere with these employees' Section 7 rights.

Based on the above, I find that the Respondent violated Section 8(a)(1) of the Act by the conduct of Fred Morales on June 19, as alleged in complaint paragraphs 5(a)(1), (2), (3), (4), and (5). This included the unlawful interrogation of employees, creating the impression among its employees that their union activities were under surveillance,[26] threatening them with unspecified reprisals if they engaged in union activities with Miguel Aguilar, and by promulgating an overly broad and discriminatory rule prohibiting employees from speaking with Union Organizer Aguilar, or from receiving literature from him.[27]

4. Alleged unlawful conduct by Fred Morales on June 21

The complaint alleges in paragraphs 5(a)(6) and (7) and 5(b)(1) through 5(b)(6) that Fred Morales engaged in a number of instances of unlawful conduct on June 21 in violation of Section 8(a)(1) of the Act. It is my understanding of the General Counsel's case that these alleged violations of the Act all occurred at the general meeting for employees held at the Respondent's warehouse office on June 21. As is set forth in detail above, this was the meeting the Respondent's managers called in order to address the concerns of certain of its employees about threats regarding the INS made by Miguel Aguilar to Jacinto Fajardo the evening before. As noted earlier, I concluded that Fajardo testified credibly, and that Aguilar had in fact made the threats attributed to him. Also, as noted above, I found the version of the meeting as testified to by the Haro brothers to be largely exaggerated and embellished. For the most part, I rejected the testimony of the Haros and accepted the testimony of other witness whom I found credible, and who tended to testify similarly about the substance of the meeting. Certainly, the weight of the evidence was heavily against the version of events as testified to by the Haros.

As also discussed above, Fred Morales admits making a reference at the meeting to paying employees for bringing him a body part from Miguel Aguilar. Morales contends that he was only joking and that the assembled employees all understood that this was just a joke, as was allegedly evidenced by the laughter at the meeting when he made the remark. Having listened to Morales testify at length and observing his demeanor, I have no doubt that he was only joking when he made the remark. I also think it likely that at least most of the employees understood that he was joking. Fred Morales apparently has a personality that lends itself to levity, even during stressful situations. Never the less, the statement was made by a supervisor to a large group of employees offering money in exchange for someone causing physical harm to a known union organizer. Beyond doubt, such a statement would have the affect of interfering with, restraining, and coercing employees in the exercise of their Section 7 rights. As such, the Respondent has violated Section 8(a)(1) of the Act as alleged in complaint paragraph 5(b)(6).

In no other instance did I find that Fred Morales committed a violation of the Act when he addressed the meeting of employees on June 21. I have concluded either that the statements attributed to him by the Haros were never made, or at a minimum, there is insufficient credible evidence that such statements were made. Certainly the weight of the witness testimony, as set forth above, strongly supports a conclusion that the alleged statements were never made. However, regarding the allegation that Morales "disparaged" the Union, complaint paragraph (5)(b)(4), I would note that even if Morales made the statement attributed to him, he is, in my opinion, protected by Section 8(c) of the Act. This allegation of the complaint concerns the Haros' contention that Morales told the employees that the Union had cheated them out of $60 each. Although I am not convinced that Morales made any such statement, if he did so it would constitute an expression of his opinion, which was not totally unreasonable in view of the fact that the Haros had told him they had given the Union $60 each, and did not seem to know what the money was for. Therefore, I believe that any such statement would not constitute a violation of the Act.

Accordingly, based on the above, I shall recommend the dismissal of complaint paragraphs 5(a)(6) and (7) and 5(b)(1) through 5(b)(5).[28]

5. Threatening employee-applicants with arrest and photographing them

Complaint paragraphs 5(c)(1) and (2) allege that in June and on July 26, Ray Skaggs threatened employee-applicants with trespassing and to summon the police and photographed them,

[26] The Board considers that an employer has created the impression of surveillance when under all the circumstances, an employer's statements and actions would convey to employees the message that their union activities were being closely monitored. *United Refrigerated Services*, 325 NLRB 36 (1998); *Savers*, 337 NLRB No. 163 (2002); *Wayne J. Griffin Electric, Inc.*, 335 NLRB 1362 (2001).

[27] It is axiomatic that an employer who tells employees not to talk with or receive any "papers" from a union organizer is both specifically promulgating an overly broad and discriminatory rule against engaging in union activity, and generally interfering with, restraining, and coercing employees in the exercise of their Section 7 rights. *Our Way, Inc.*, 268 NLRB 394 (1983).

[28] It should be noted that admitted into evidence is a memo dated July 1, 1999, from Mike Skaggs to all employees. (GC Exh. 6.) On its face, this document appears to be an overly broad no-solicitation, no-distribution rule. However, it is not alleged as a violation of the Act in the complaint, and counsel for the General Counsel does not raise the matter in his post-hearing brief. Accordingly, I consider that the issue is not before me for adjudication.

because of their union activity. However, the evidence, including the testimony of almost all the witnesses, establishes that these events all occurred on July 26, at the Respondent's warehouse office. The events of that date have been set forth in detail earlier in this decision. By way of summary, July 26 was the date that the Haro brothers met with Skaggs and the Morales brothers, which meeting ultimately led to their termination. It was also the date when three separate groups of union affiliated employee-applicants appeared at the Respondent's facility. As I have indicated above, the evidence is clear that the Respondent's managers knew at the time of these events that these "employee-applicants" were affiliated with the Union.

The weight of the credible evidence establishes that as of July 26, the Respondent had posted its property with a number of "No Trespassing" signs, and also that the Respondent's semipermanent "Not Hiring" sign was on display. I believe that the "employee-applicants" who testified that they did not see these signs were, at best, disingenuous. The signs, photographs of which are in evidence, were prominently posted. (R. Exhs. 4–7.) If the employee-applicants did not see the signs, it is only because they did not want to see them. Further, it is clear that the "visits" by these three groups of men were being coordinated, as many of the "employee-applicants" testified that they met with Miguel Aguilar early that morning at a local Denny's restaurant.

It is the Respondent's position that its managers felt they were under assault, and that there was a coordinated effort to interfere with their normal business operation. As they had posted the property with "No Trespassing" and "Not Hiring" signs, it is the position of the Respondent that its managers had the right to protect its property interest, and order the "trespassers" off the facility, and to call the police if they refused to leave. Ray Skaggs testified that he felt that the men were "trespassers" who were breaking the law, and that photographs were taken of the men and their vehicles in order to have evidence of the incident and to be able to identify the individuals involved. (R. Exhs. 8–13.) According to Skaggs, he decided to tape record the incidents for the same reason. A tape recorder was available because he had intended to use it to record the scheduled meeting with the Haro brothers. Further, Skaggs testified that he was fearful the "trespassers" might cause him, or the other managers, some type of physical harm. Specifically, he was allegedly frightened that Harold Hamman, who he described as an "enforcer," might harm him. Allegedly, he was so frightened and upset by Hamman's presence that the paramedics needed to be called to treat his high blood pressure. (R. Exhs. 14, 15, 26.) Of the three separate incidents on July 26, apparently this was the only one where the police were actually called. (R. Exh. 27.)

The Respondent's managers acknowledge that they do not normally photograph or tape record applicants for employment who appear at their facility to apply for work. Further, they acknowledge that applicants do periodically appear at the warehouse office facility seeking employment. Based on all the credible evidence, I have no doubt that Skaggs and the Morales brothers knew that the three groups of men who appeared at the facility on July 26 were union-affiliated men who intended to ask for employment. The various tape-recordings establish beyond question that the Respondent's managers were determined to confront them with the threat of trespass before the union men had a chance to speak, thus, effectively preventing them from asking for employment.

I am not at all convinced that the Respondent's managers, of which there were three, were genuinely fearful for their physical safety from the "employee-applicants." Further, I believe that Ray Skaggs was being highly "melodramatic" when he had both the police and the paramedics called following the visit of Miguel Aguilar and Harold Hamman. I am also not convinced that the managers photographed the "employee-applicants" and their vehicles in order to have proof of the incident. To the contrary, I do not believe that the managers were genuinely concerned about the alleged violation of the Respondent's property rights by the "trespassers."

I am of the opinion that the issue of trespassing was simply a ruse, intended to provide cover for the managers' real interest, which was to force the employee-applicants off the property before they had a chance to ask for work.[29] An objective review of the tape recordings establishes that the employee-applicants were acting in a peaceful, nonconfrontational way and were clearly attempting to apply for work. The Respondent's threatening of employee-applicants with trespassing and to summon the police, as well as, the photographing of the men and their vehicles, would reasonably have a chilling effect on their Section 7 rights. The photographing would also have given the employee-applicants reason to believe that they were under surveillance because of their union affiliation.

Accordingly, based on the above, I conclude that the Respondent's actions of July 26 interfered with, restrained, and coerced employees in the exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act, as alleged in paragraphs 5(c)(1)[30] and (2) of the complaint.[31]

6. Alleged unlawful conduct by Antonio Galvan

Complaint paragraphs 5(d)(1) through 5(d)(7) allege that on July 8 and 9, Antonio Galvan engaged in certain conduct in violation of Section 8(a)(1) of the Act. Although not named in these complaint paragraphs, it is clear from the evidence presented that the employees whose Section 7 rights were allegedly interfered with, and who were restrained and coerced,

[29] The matter of whether the employee-applicants were actually trespassing is not an issue the undersigned needs to decide. Under the facts as presented, the Respondent was treating the individuals in question differently than it had ever treated previous employee-applicants. I conclude that it did so for the sole purpose of attempting to prevent them from applying for work because they were union affiliated employee-applicants. See *Waco, Inc.*, 273 NLRB 746 (1984); *Captain Nemo's*, 258 NLRB 537 (1981); *Indio Grocery Outlet*, 323 NLRB 1138 (1997).

[30] Although this complaint paragraph mentions "June," I have concluded that the Respondent's unlawful conduct set forth in the paragraph actually occurred on July 26.

[31] This finding is not in conflict with my earlier conclusion that the Respondent had rebutted the General Counsel's prima facie case and established that based on its priority hiring system, it would not have hired or even considered for hire the employee-applicants named in the complaint, even in the absence of their union affiliation.

were the Haro brothers. Also, complaint paragraphs 6(j), 6(k), and (6)(l) allege that on July 8 and 9, the Respondent isolated, imposed more onerous working conditions on, and increased the work load of, Jaime Haro, in violation of Section 8(a)(3) of the Act. From the evidence presented, it is clear that Antonio Galvan was the Respondents "supervisor" or "agent" alleged to have taken this action against Jaime Haro, because of his union activity.

The issue of Antonio Galvan's alleged supervisory and agency status has been discussed in detail earlier in this decision. As was noted, I concluded that Galvan was not a supervisor or agent of the Respondent as defined in the Act. Therefore, the Respondent is not responsible for the actions attributed to Galvan. However, I also concluded that even if Galvan were found to be a supervisor or agent, the conduct attributed to him did not occur. For the reasons I previously gave, I found Jaime and Juan Carlos Haro to be incredible, and Galvan impressed me as a credible witness. I am of the belief, as set forth above in detail, that Galvan made no statements to the Haros as could be considered to have interfered with, restrained or coerced either of the Haros in the exercise of their Section 7 rights.

Also, again for the reasons previously expressed, I find no credible evidence that Galvan imposed more onerous working conditions on Jaime Haro, increased his workload, or isolated him,[32] as alleged in the complaint. In my opinion, there is no question that Jaime Haro's work production had become very low, and there is no credible evidence that Galvan expected Jaime to perform an amount or type of work not being performed by the other insulators.

Accordingly, based on the above, I shall recommend that complaint paragraphs 5(d)(1) through 5(d)(7), and 6(j), 6(k) and 6(l) be dismissed.

7. The discharge of Manuel Aguilar

It is alleged in paragraph 6(c) of the complaint that on June 18, the Respondent discharged Manuel Aguilar because of his union activity and affiliation. The events surrounding Aguilar's hiring and discharge are set forth above in detail. The Respondent, of course, takes the position that Aguilar was discharged because he lied to Fred Morales when hired and used an alias, that of Ricardo Lopez.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or (1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. This showing must be by a preponderance of the evidence. Then, upon such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The Board's *Wright Line* test was approved by the United States Supreme Court in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983).

[32] Concomitantly, there is no evidence that the Respondent isolated Juan Carlos Haro.

In the matter before me, I conclude that the General Counsel has made a prima facie showing that Miguel Aguilar's union activity and affiliation was a motivating factor in the Respondent's decision to terminate him. In *Tracker Marine, L.L.C.*, 337 NLRB No. 94 (2002), the Board affirmed the administrative law judge who evaluated the question of the employer's motivation under the framework established in *Wright Line.* Under that framework, the General Counsel must establish four elements by a preponderance of the evidence. First, the General Counsel must show the existence of activity protected by the Act. Second, the General Counsel must prove that the respondent was aware that the employee had engaged in such activity. Third, the General Counsel must show that the alleged discriminatee suffered an adverse employment action. Fourth, the General Counsel must establish a link, or nexus, between the employee's protected activity and the adverse employment action. In effect, proving these four elements creates a presumption that the adverse employment action violated the Act. To rebut such a presumption, the respondent bears the burden of showing that the same action would have taken place even in the absence of the protected conduct. See also *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996); *Farmer Brothers Co.*, 303 NLRB 638, 649 (1991).

There is no doubt that Miguel Aguilar was engaged in significant union activity. After all, he was the union agent assigned to organize the Respondent's employees. Apparently, he decided after his initial efforts were not successful, to become a "salt" and continue his organizing efforts from the "inside." To this end, he obtained employment with the Respondent on June 14. Of course, he obtained employment under the name Richardo Lopez. Both before and after he was hired, Aguilar spoke to a number of the Respondent's employees about the benefits of union representation. According to Aguilar, and other witnesses, these conversations took place both on the Respondent's jobsites and at the homes of a number of the Respondents installers. Also, Aguilar had occasion to distribute to some of these employees a number of union pamphlets and other union related literature. There also is no doubt that the Respondent was aware of at least some of that union activity prior to discharging Aguilar. As Fred Morales candidly admitted, Antonio Galvan informed him on June 17 that three men he had just hired were affiliated with the Union. Morales understood these men to be Lopez, aka Aguilar, and the Haro brothers. It also appears that when Aguilar entered the warehouse office on June 18 to submit his payroll paperwork, he was wearing a T-shirt that had inscribed on it, "Union, yes," or words to that effect. It seems obvious to me, that the Respondent's managers saw this shirt before they were faced with the question of Lopez' identity.

Certainly, Miguel Aguilar suffered an adverse employment action. He was discharged on June 18, only 4 days after being hired, and only 3 days after his work so impressed Fred Morales that he was given a raise.

Regarding the question of whether there exists a link or nexus between Aguilar's union activity and his discharge by the Respondent, I believe that the events of June 18 establish such a connection. There were several comments by the Respondent's managers, which show that Aguilar's union affiliation

was at least something that troubled them. The tape recordings of that meeting reflect that Fred Morales told Aguilar, "We need someone to work. I don't need someone to talk all day." The only matter, which logically Fred Morales could have been referring to, was Aguilar's union activity. Further supporting that conclusion was Fred Morales' next question, "What's with this shirt that says Union Yes? What is that all about?" While Albert Morales stated that, "I don't care if you are Union or not, . . ." he also added, ". . . if you wanted to work and then come in with that." Again this was a reference to Aguilar's T-shirt.

Also, as I have indicated earlier in this decision, I believe there is evidence of antiunion animus on the part of the Respondent. I have found that the Respondent's managers committed significant violations of Section 8(a)(1) of the Act. These included interrogation of employees' union activities, creating an impression among employees that their union activities were under surveillance, promulgating an overly broad and discriminatory rule prohibiting employees from speaking to union organizers, and threatening employees with reprisals for engaging in union activities. Also included are instances of the Respondent's managers photographing employee-applicants, and threatening them with trespassing and to summon the police because they were engaged in union activities and were affiliated with the Union.

Based on all the above, I believe that the General Counsel has met his burden of establishing that the Respondent's action in terminating Manuel Aguilar was motivated, at least in part, by antiunion considerations. The burden now shifts to the Respondent to show that it would have taken the same action absent the protected conduct. *Senior Citizens Coordinating Council of Riverbay Community*, 330 NLRB 1100 (2000); *Regal Recycling, Inc.,* 329 NLRB 355 (1999). The Respondent must persuade by a preponderance of the evidence. *Peter Vitalie Co.,* 310 NLRB 865, 871 (1993). I am of the view that the Respondent has met this burden.

Fred Morales candidly admitted that shortly after he hired Aguilar, aka Lopez, he learned from Antonio Galvan that Aguilar and the Haros' were affiliated with the Union. However, he testified that he did not care, allegedly telling Galvan that it did not matter if they "were with the Union" as, "They were doing an excellent job, . . . their production was great." I strongly suspect that this was in fact true. Having given Aguilar a raise his first day on the job, clearly Fred Morales was pleased with Aguilar's work. Apparently he was still pleased with Aguilar on the morning of June 18 when Aguilar and the Haros were told to come to the warehouse office and submit their payroll paperwork. This, of course, was *after* Morales had learned from Galvan of Aguilar's union affiliation.

A review of the tape recordings for June 18 shows that initially the Respondent's managers seem happy to see Aguilar and the Haros. It is not until the man they knew as Ricardo Lopez produced identification in the name of Miguel Aguilar that the atmosphere at the meeting abruptly changed, and the managers become less friendly and obviously concerned. While Aguilar testified that he showed the managers his union business card at the same time that they saw from his identification that he was not Lopez, I heard no reference to his union business card on the tapes. Rather, it appears to me that the managers became immediately concerned upon learning that the man standing before them was not who he had claimed to be. It is Aguilar, not the managers, who interjects the Union into the conversation, telling them that he is the union organizer, and that if he had used his true name they never would have hired him. The managers admit no such thing, with Fred Morales asking Aguilar why he lied to them, and indicating that the name Miguel Aguilar had no special meaning to him.

Ray Skaggs is heard on the tapes to refer to Aguilar as a "pathological liar" and having engaged in "misrepresentation," and it is clear that the managers are telling Aguilar in no uncertain terms that the Respondent will not allow him to continue as an employee because he used an alias in obtaining his job. As noted earlier, Albert Morales says at one point that he does not care whether Aguilar is affiliated with the Union or not, although this comment is somewhat contradicted by his reference to the union T-shirt. For his part, Aguilar tries to be friendly, making "small talk," and apparently attempting to impress or frighten the managers by telling them that, "Actually, I know a lot of labor law."[33] The managers are noticeably more serious than when Aguilar initially entered the office, although, to some extent, they attempt to respondent pleasantly to Aguilar's banter.

As I explained in detail above, I found Aguilar generally incredible, while I viewed the Morales brothers as generally truthful. Accordingly, I credit the Morales brothers' version of the June 18 meeting to the extent it differs from that told by Aguilar. Further, I accept the testimony of the Morales brothers that they have never knowingly hired any employee using an alias, and would not do so.[34] No credible evidence was offered by the General Counsel to rebut that assertion. I accept the testimony of the Morales brothers that the Respondent fired Miguel Aguilar because he had used the alias of Ricardo Lopez in asking for employment. While I continue to believe that Aguilar's union affiliation and activities may well have been a motivating factor, I also believe that the Respondent would have fired Aguilar upon learning of his use of an alias, even if he had no union affiliation or activities. Accordingly, the Respondent has met its burden and rebutted the General Counsel's prima facie case.

Therefore, I shall recommend that complaint paragraph 6(c) be dismissed.

8. The discharge of Juan Carlos and Jaime Haro

It is alleged in complaint paragraphs 6(o) and 6(p) that the Respondent discharged, respectively, Juan Carlos Haro and Jaime Haro because of their union activities and affiliation. The events surrounding the hiring, employment, and discharge of the Haros has been set forth above in detail.

[33] It appears that Miguel Aguilar does not know as much labor law as he believes.

[34] The undersigned takes administrative notice that under the Immigration Reform and Control Act of 1986, an employer, by reviewing documentation, must verify the identity, and employment eligibility status, of any person hired by that employer. However, it is important to note that there is no contention that Miguel Aguilar is not authorized to work in the United States, and no reason to believe that is the case.

Applying the standards and factors as set forth by the Board in *Wright Line,* supra*;* and *Tracker Marine,* supra, I conclude that the General Counsel has failed to establish a prima facie case that the Haros' union activity was a motivating factor in the Respondent's decision to terminate them. For the reasons cited in detail above, I found the Haros not to be credible. Nevertheless, I will accept their testimony that during the course of their employment they spoke to a number of other employees while on jobsites about the benefits of union representation, and also that they distributed union pamphlets and literature to a number of installers. Of course, they were affiliated with the union, and it appears fairly obvious that the Respondent at least knew of their union affiliation. They had introduced Ricardo Lopez, aka Miguel Aguilar, to Fred Morales as their friend. The evidence further establishes that on June 17, Antonio Galvan informed Fred Morales that the installers he had recently hired, meaning the Haros and Aguilar, were union men. Also, I have found that following Aguilar's discharge, Morales, on June 19, interrogated the Haros about their union affiliation and activities, as well as giving them the impression that their union activities were under surveillance, and threatening them with unspecified reprisals if they continued to have contact with Aguilar. These, of course, as well as other violations of the Act, were serious unfair labor practices committed by the Respondent. As noted earlier, such conduct on the part of the Respondent demonstrates antiunion animus. Further, it is obvious that the Respondent's discharge of the Haros on July 26[35] constituted adverse employment actions.

However, while counsel for the General Counsel has met three factors necessary to establish a prima facie case, I do not believe that he has satisfied the fourth factor, namely a link, or nexus, between the Haro brothers' protected activity and their termination. From June 19 until July 8, the Haro brothers continued to be employed by the Respondent without any suggestion that their work was a problem. To the contrary, the Morales brother both testified that the Haros performed their jobs well. Suddenly, their work production decreased significantly and their attitudes changed, as they seemed to exhibit hostility toward the Respondent. As is set forth in detail above, a number of the Respondent's foremen testified credibly about problems that the Haros were causing on the various jobsites to which they were assigned.

The Respondent's witnesses were unable to offer any reason why the Haros' attitudes seemed to suddenly change, and the Haros denied any change on their part regarding attitude or production. However, as noted earlier, I found the Haros incredible, and I am of the belief that, for whatever reason, their production was significantly reduced and they did exhibit hostility toward the Respondent and its foremen. In any event, after the problems with the Haros were reported to the Respondent's superintendents, the Morales brothers directed the foremen to monitor the situation, and the superintendents began to keep a record of these incidents. The Respondent's witnesses, Ray Skaggs and the Morales brothers, admitted that they had never before documented over a period of weeks the work performance and attitude of any employee. However, they testified that prior to the Haros, they had never had an employee whose production or attitude had been such a problem. According to the Respondent's witnesses, except for Miguel Aguilar and the Haros, they had not had occasion in recent years to discharge any employee. While employees are frequently "laid off," this is simply a result of an economic reduction-in-force.

In reviewing the situation with the Haros in totality, it appears to me that initially the Respondent was quite pleased with the Haros' work performance, despite being aware that they were affiliated with the Union. I believe the testimony of the Morales brothers that they were largely unconcerned with whether the Haros supported the Union or not, and were happy with the quality of their work. Further, I believe that, for whatever reason, the Haros' attitude and work performance suddenly deteriorated. This concerned the Haros greatly, and they began to monitor and document the situation around the end of the first week in July. Unfortunately the situation got worse, requiring the superintendents to take action. To that end, the Morales brothers prepared the written Notice of Charges, which they asked the Haros to respond to. Upon refusing, the Haros were terminated on July 26, the result of their low production, poor attitude, and refusal to respond to the "charges."

In my view, the Respondent had sufficient cause to discharge the Haros. Further, I believe the General Counsel has failed to establish a nexus or link between the Haros' union activities and affiliation, and their discharges. Therefore, I find that the General Counsel has not made a prima facie showing that the Haro brothers' union activities or affiliation were a motivating factor in the Respondent's decision to terminate them.

However, even assuming, for the sake of argument, that the General Counsel had established a prima facie case, the evidence is clear that the Respondent would still have discharged the Haros, even absent their union affiliation and activities. As I have said, the evidence establishes that the Respondent had sufficient cause to discharge the brothers. Their work had deteriorated to the point where something needed to happen. The Respondent could not allow the Haros' low production and antagonistic attitude to affect the other men on the crews they were working with. The foremen had attempted to assist the Haros and find out the cause of their difficulty, but the Haros had met them with hostility. Under these circumstances, the Respondent's action was reasonable.

In my view, the Respondent's stated reason for terminating the Haros was not a pretext. They were fired for good cause. Accordingly, I find that the Respondent has persuasively established by a preponderance of the evidence that it would have made the same decision to discharge Jaime and Juan Carlos Haro, even in the absence of their union activities and affiliation. *T&J Trucking Co.*, 316 NLRB 771 (1995).

Therefore, based on the above, I shall recommend that complaint paragraphs 6(o) and 6(p) be dismissed.

C. Summary

As is reflected above, I recommend dismissal of the following paragraphs of the complaint: 5(a)(6) and (7), 5(b)(1) through 5(b)(5), 5(d)(1) through 5(d)(7), and 6(a) through 6(s).

[35] Although the complaint reflects that Juan Carlos Haro was fired on July 21, I believe that the evidence establishes that both Haros were discharged on July 26.

Further, I find that the Respondent has violated Section 8(a)(1) of the Act as alleged in paragraphs 5(a)(1) through 5(a)(5), 5(b)(6), and 5(c)(1)(i)(ii) and (2) of the complaint.

CONCLUSIONS OF LAW

1. The Respondent, Quality Mechanical Insulation, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, International Association Of Heat and Frost Insulators and Asbestos Workers, Local 73 of Arizona, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. By the following acts and conduct the Respondent has violated Section 8(a)(1) of the Act.

(a) Interrogating its employees regarding their union membership, activities and sympathies.

(b) Engaging in surveillance, or creating an impression among its employees that their union activities were under surveillance.

(c) Threatening its employees with unspecified reprisals to discourage them from engaging in union and other concerted activities.

(d) Promulgating an overly broad and discriminatory rule prohibiting its employees from interacting with, or speaking to, a union organizer.

(e) Soliciting its employees to do bodily harm to a union organizer to discourage its employees from engaging in union activities.

(f) Threatening employee-applicants with trespassing and to summon the police, because of their union affiliation and other concerted activities.

(g) Engaging in surveillance of employee-applicants by photographing them, because of their union affiliation and other concerted activities.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not committed the other violations of law that are alleged in paragraphs 5(a)(6) and (7), 5(b)(1) through 5(b)(5), 5(d)(1) through 5(d)(7), and 6(a) through 6(s) of the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[36]

ORDER

The Respondent, Quality Mechanical Insulation, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees regarding their union membership, activities, and sympathies.

(b) Engaging in surveillance, or creating an impression among its employees that their union activities were under surveillance.

(c) Threatening its employees with unspecified reprisals to discourage them from engaging in union and other concerted activities.

(d) Promulgating an overly broad and discriminatory rule prohibiting its employees from interacting with, or speaking to, a union organizer.

(e) Soliciting its employees to do bodily harm to a union organizer to discourage its employees from engaging in union activities.

(f) Threatening employee-applicants with trespassing and to summon the police, because of their union affiliation and other concerted activities.

(g) Engaging in surveillance of employee-applicants by photographing them, because of their union affiliation and other concerted activities.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its warehouse office in Phoenix, Arizona, copies of the attached notice (in both English and Spanish) marked "Appendix."[37] Copies of the notice (in both English and Spanish), on forms provided by the Regional Director for Region 28 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 1, 2002.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, San Francisco, California July 7, 2003

[36] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[37] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. Specifically:

WE WILL NOT coercively question you about your support for, or activities on behalf of, International Association of Heat and Frost Insulators and Asbestos Workers, Local 73 of Arizona, AFL–CIO, CLC (the Union), or any other union.

WE WILL NOT engage in surveillance of your activities on behalf of the Union, or any other union, or give you the impression that we are doing so.

WE WILL NOT threaten you with reprisals in order to discourage you from engaging in activities on behalf of the Union, or any other union.

WE WILL NOT prohibit you from meeting with, or speaking to, organizers on behalf of the Union, or any other union.

WE WILL NOT offer you a benefit, or otherwise encourage you, to do bodily harm to an organizer on behalf of the Union, or any other union, in order to discourage you from engaging in union activities.

WE WILL NOT threaten applicants for employment with trespassing and to summon the police, because of their affiliation with the Union, or any other union, or because they engaged in group activities protected under the law.

WE WILL NOT engage in surveillance of applicants for employment by photographing them, because of their affiliation with the Union, or any other union, or because they engaged in group activities protected under the law.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

QUALITY MECHANICAL INSULATION, INC.